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In the Supreme Court of the United States

OCTOBER TERM, [redacted]1970

RALPH FEBRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OCTOBER TERM, 1969

No. 1636

RALPH FEBRE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1970. A petition for rehearing was denied on May 1, 1970. The petition for a writ of certiorari was filed on June 1, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether possession of heroin by petitioner was adequately proved.

2. Whether the trial court's instructions on possession were erroneous.

3. Whether reversal on two counts of a four-count indictment upon which petitioner was convicted, and for which equal, concurrent sentences were imposed, requires a remand for reassessment of the convictions or sentence.

STATEMENT

On October 27, 1967, a five-count indictment was returned in the United States District Court for the Southern District of New York against petitioner and two co-defendants, Joseph Pego and Edward Bless. Counts 1 through 4 charged sales of various quantities of unlawfully imported heroin on February 14, February 20, March 8 and April 6, 1967, with petitioner named in all but the first count. Count 5 charged all three defendants with conspiracy, from January 1, 1967, to the date of the indictment, to violate the federal narcotics laws. After a jury trial, petitioner was convicted on Counts 2, 3, 4 and 5. On December 12, 1968, he was sentenced to imprisonment for concurrent, six-year terms. The court of appeals affirmed petitioner's convictions on Counts 2 and 5, but reversed on Counts 3 and 4.

1. The evidence showed that on the evening of February 14, 1967, at the intersection of 170th Street

and Jerome Avenue in the Bronx, co-defendant Pego[1] sold 36 grams of heroin to undercover agent Clarence Cook (Tr. 49-55).[2] Cook stated that if satisfied with the quality he would thereafter make larger purchases (Tr. 55). At 9 p.m. on February 20, 1967, Cook notified Pego through an informant that he was interested in purchasing an ounce of heroin. Declaring that he would have to get the narcotics, Pego directed Cook and his informant to go to the latter's residence and await his telephone call (Tr. 57-59). Agents maintaining a surveillance of Pego's residence observed him depart from it at 9:20 and ride by taxicab to the Bat Cave Bar in Manhattan, arriving there at 9:35 p.m. (Tr. 117, 188-189). Petitioner met Pego there about an hour later. After a brief conversation inside, petitioner and Pego left the tavern and entered an automobile parked directly in front. They sat there for approximately five minutes. Then, leaving petitioner in the car, Pego reentered the bar at 10:30 p.m. and made his telephone call to Cook, informing him that he had the narcotics and directing him to be at 170th Street and Jerome Avenue in a half-hour (Tr. 60, 117-118, 190, 233). Pego then returned to petitioner's car, and they drove off. At the Jerome Avenue meeting site Pego left petitioner's car and met Cook. They completed their transaction, and then discussed purchases of even larger quanti-

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[1] Pego, named in all of the counts, entered a plea of guilty on the first day of trial. He did not testify for either side.

[2] "Tr." refers to the transcript of trial, which is on file with the Clerk of this Court.

ties if the price was desirable (Tr. 61-62, 119, 191). Pego then walked to his home, a few blocks away.

Pego met Cook on February 23 for the purpose of receiving money owed from the prior transaction. Cook asked about purchasing one-eighth of a kilogram of pure heroin. Pego quoted a price of $4,800 and assured the agent that the heroin would be undiluted (Tr. 63). On March 8, they again met at the Jerome Avenue corner. Cook expressed dissatisfaction with the quality of his February 20th buy, and requested a sample before he would commit himself to any further purchases. Pego agreed and arranged for a meeting at another location later that evening. Pego then proceeded to an apartment rented by petitioner's brother. A few minutes later he and petitioner emerged from the apartment building and departed in opposite directions (Tr. 124, 192). Pego met Cook and gave him the desired sample. Cook agreed to contact Pego in a few days regarding the proposed one-eighth kilogram purchase (Tr. 65).

At their next meeting on March 13, 1967, Cook increased his request to one-quarter of a kilogram. The price was set at $8,700 (Tr. 69-70). Pego then went to petitioner's brother's apartment, following which he met agent Cook and announced that there was some delay in acquiring a one-half kilogram batch, from which the one-quarter desired by Cook would be taken (Tr. 71, 127). Pego returned to the apartment. Later that evening he informed Cook that his "people" would not obtain the narcotics for a couple of weeks (Tr. 71). On April 4 Pego stated

that they could consummate the transaction the next day (Tr. 72).

At 8 p.m. on April 5, Pego told Cook to wait in the Port Authority Bus Terminal at 178th Street and Broadway while he obtained the heroin. Pego then drove the few blocks to the Bat Cave Bar. Inside, he sat on a stool next to another undercover agent (Tr. 236-238). The agent saw petitioner approach Pego, ask if he had seen "the Negro" (*i.e.*, Cook), and say, "What does he want?" (Tr. 238). On learning of the quantity of narcotics desired by Cook, petitioner turned to co-defendant Bless, who was sitting nearby, and asked if he could "handle it." Bless replied that it would take about 45 minutes. Pego indicated that the timing was good because he had scheduled his delivery for 9:30. Bless departed and petitioner sat on the stool vacated by Bless (Tr. 239-240). He continued to converse with Pego, remarking at one point that the operation would be running smoothly because Bless was easier to get along with than his predecessor (who had recently died). At approximately 9:45 p.m. Bless returned and told the others, "It can't be done tonight. It has to be tomorrow" (Tr. 242). Petitioner raised his voice, demanding to know the reason for the delay. Bless told him to lower his voice, and they continued their conversation. Pego then left the bar and met Cook, informing him that he had spoken with his source of supply and that delivery would be delayed until the following day (Tr. 73-74). The following afternoon Pego and Cook met in Cook's car at the customary Jerome Avenue location (Tr. 75). As Cook drove, Pego produced a quarter

kilogram package. Responding to a prearranged signal, agents who had been following Cook's car intercepted it and arrested Pego (Tr. 75, 140-141).

2. The court of appeals reviewed each of the four counts upon which petitioner had been convicted, directing its attention particularly to petitioner's allegation that the proof did not show that he knew the heroin had been unlawfully imported, since there was no direct evidence of knowledge and inadequate proof of "possession" to permit reliance on the statutory presumption contained in 21 U.S.C. 174. All of the judges on the panel concluded that, as to Count 2, the jury could reasonably have found that petitioner had personally delivered the heroin to Pego on February 20, and, accordingly, had actually possessed it; consequently, they sustained the convictions on that substantive count and conspiracy (Count 5). Reviewing the evidence supporting Counts 3 and 4, involving Pego's trip on March 8 to the apartment house in which petitioner's brother resided, and the incident in the Bat Cave Bar on April 5, however, the court determined that the connection between Pego and petitioner was insufficient to support the convictions.

Recognizing that petitioner had received equal, concurrent sentences on all counts, the majority nevertheless chose not to invoke the concurrent sentence doctrine insofar as the convictions were concerned, but instead ordered counts 3 and 4 reversed. The majority also decided that, despite this partial reversal, it would not remand for a new trial on the remaining counts, reasoning that the evidence sup-

porting those counts was so separate and distinct from the evidence on the defective counts that the jury could not have mistakenly considered other evidence while determining guilt on the valid counts. It also found no reason to remand for resentencing, since petitioner's sentence was only one year longer than the statutory minimum and there was strong indication that the number of counts did not affect the sentence (Pet. App. 13). The majority referred to the fact that Bless received a sentence of seven years on conviction of one count and Pego received concurrent, five-year terms following his plea of guilty to five counts.[3]

ARGUMENT

1. The court of appeals correctly determined that there was sufficient proof of possession by petitioner of the narcotics involved in Count 2 to give rise to the statutory presumption that he knew the heroin had been imported. When agent Cook first ordered the heroin on February 20, Pego said that he did not have it and would have to get it. Pego then went to the Bat Cave Bar. Whether or not Pego might have conversed with a number of customers while there, it was only after petitioner had arrived and had conferred privately with Pego that the promised tele-

[3] Judge Hays dissented on the question whether a remand was appropriate. He suggested that, in light of this Court's opinion in *Benton* v. *Maryland*, 395 U.S. 784, the concurrent sentence doctrine was ripe for "total elimination" in "a proper case" (Pet. App. 14), and would have remanded not only for resentencing but also for a new trial on Counts 2 and 5 (*id.* at 14-15).

phone call to Cook, announcing that the heroin was now available, was made. Immediately after the conference and telephone call, petitioner and Pego together drove to the meeting with Cook to complete the sale. From this evidence the jury could reasonably infer that, at the very least, petitioner shared with Pego the possession of the heroin sold to the agent on that occasion. *Cazares-Ramirez* v. *United States*, 406 F. 2d 228 (C.A. 5); *United States* v. *Baratta*, 397 F. 2d 215, 224 (C.A. 2), certiorari denied, 393 U.S. 939; *Smith* v. *United States*, 385 F. 2d 34, 39 (C.A. 5); *United States* v. *Tucker*, 380 F. 2d 206 (C.A. 2); *United States* v. *Lopez*, 355 F. 2d 250 (C.A. 2), certiorari denied, 384 U.S. 1013.[1]

2. Petitioner failed to submit written requests for instructions and took no exceptions to any part of the trial court's charge. His attempt on appeal to assert instructional error thus contravenes the explicit provisions of Rule 30, F.R. Crim. P. In any event, petitioner's claims are not meritorious.

As noted by the court of appeals (Pet. App. 9-11), the instruction on joint undertakings did not allow the jury to convict petitioner merely by attaching to him the criminality of Pego; rather, the court told the jury that once petitioner and others had been found to have been involved in a common criminal plan, it could consider the acts and statements of the others in determining whether petitioner possessed

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[1] The evidence of petitioner's subsequent conduct would have been admissible both on the conspiracy count and on Count 2, since it tended to show petitioner's relationship to the others. There was thus no reason to order a new trial.

narcotics. On the conspiracy count, while it might have been the better practice to give a specific charge on possession by petitioner personally while discussing the conspiracy count, the absence of such an instruction at that juncture was not plain error, since the conspiracy charge incorporated the instructions on the substantive count, which specifically referred to the element of possession. See *United States* v. *Baratta*, 397 F. 2d 215 (C.A. 2), certiorari denied, 393 U.S. 939. Petitioner points to decisions in the Fifth and Ninth Circuits which he characterizes as reaching the opposite result—*Hill* v. *United States*, 379 F. 2d 811 (C.A. 9); *Smith* v. *United States*, 385 F. 2d 34 (C.A. 5). Petitioner does not discuss, and we are unable to perceive, how *Smith* is in conflict with the holding here. The *Hill* decision is distinguishable on its facts, which failed to show a connection between the defendant (last seen on November 8) and the marihuana transaction (two days later). Moreover, there was in that case an aiding and abetting instruction which enabled the jury to find guilt without personal knowledge of importation (see 379 F. 2d at 814).

3. Even prior to *Benton* v. *Maryland*, 395 U.S. 784, the Court of Appeals for the Second Circuit had deemed non-jurisdictional the rule against reversing convictions on some counts of a multi-count indictment where concurrent sentences had been imposed. Thus, in an appropriate setting it has in the past remanded for resentencing after such a partial reversal. *United States* v. *Hines*, 256 F. 2d 561 (C.A. 2); see *United States* v. *Scandifia*, 390 F. 2d 244, 250, n. 7, (C.A.

2), vacated on other grounds *sub nom. Giordano* v. *United States*, 394 U.S. 310; *United States* v. *Barash*, 365 F. 2d 395, 399 (C.A. 2); *United States* v. *Bottone*, 365 F. 2d 389, 394 (C.A. 2), certiorari denied, 385 U.S. 974. In the present case, however, the majority was reasonably convinced that the number of counts did not influence the trial court's determination of the sentence, which was only one year above the minimum (see *supra*, p. 7). Since nothing in the record suggests the contrary, the decision not to require reassessment of petitioner's sentence was not an abuse of discretion.[5] See *Saville* v. *United States*, 400 F. 2d 397 (C.A. 1), certiorari denied, 395 U.S. 980. Nor does petitioner make a convincing showing that the majority below erred in concluding that it is "highly unlikely that the evidence presented on the two counts [on which it] reversed could have been mistakenly considered by the jury as tending to establish guilt" on the other two counts (Pet. App. 12-13). This was so, the majority determined, because "[C]ount two arose from a discrete series of events" and, in any event, "the testimony on the reversed counts would have been before the jury even had these counts been dismissed, for all of this evidence tended to show the existence of the conspiracy charged in count five" (*id.* at 13).

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[5] In any event, the district court may still consider reduction of the sentence if request is made under Rule 35, F. R. Crim. P.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1970.

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